ORIGINAL

91-7814

Supreme Court, U.S.
FILED
MAR 9 1992
OFFICE OF THE CLERK

RECEIVED
APR 1992
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

---

JOHNNY LEE MUKES, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

On Appeal from the Sixth Circuit United States Court of Appeals

---

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

---

COMES NOW the Petitioner, JOHNNY LEE MUKES, by and through Counsel of Record, Charles E. Waldman, Attorney at Law, and would state to this Honorable Court as follows:

1. Petitioner requests leave to proceed in forma pauperis pursuant to Supreme Court Rule 39.

2. Counsel for the Petitioner, Charles E. Waldman was appointed to represent the Petitioner by the Sixth Circuit Court of Appeals pursuant to the Criminal Justice Act of 1964, as amended. 18 U.S.C. Sec. 3006A.

3. Petitioner sought leave to proceed in forma pauperis in the Sixth Circuit Court of Appeals and leave was granted.

WHEREFORE, PREMISES CONSIDERED, PETITIONER PRAYS: that upon the hearing of this Motion, this Honorable Court shall grant the Petitioner leave to proceed in forma pauperis.

Respectfully Submitted,

Charles E. Waldman
Attorney for Petitioner
147 Jefferson, Suite 1102
Memphis, Tennessee 38103
(901) 521-9956

CERTIFICATE OF SERVICE

I, Charles E. Waldman, certify that I have mailed a copy of the foregoing Motion, first class postage, prepaid to Stuart J. Canale, Assistant United States District Attorney, Western District of Tennessee, Western Division, 1026 Federal Office Building, Memphis, Tennessee 38103, Counsel for the Respondent.

This 23rd day of March, 1992

Charles E. Waldman
147 Jefferson, Suite 1102
Memphis, Tennessee 38103
(901) 521 9956

## QUESTION PRESENTED

Has a defendant been improperly convicted of using or carrying a firearm, during and in relation to any drug trafficking crime under 18 U.S.C. § 924 (c)(1), in a situation in which the defendant was convicted of a drug trafficking crime, a firearm was found in the same drawer with narcotics at the address searched by police pursuant to the warrant, but where there is no further evidence offered by the government as to the purpose, origin, or operation of the firearm?

---



## LIST OF PARTIES

The parties to the procedings below were the petitioner Johnny Lee Mukes and the respondent, the United States of America.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| LIST OF PARTIES | ii |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED | 2 |
| STATEMENT OF THE CASE | 5 |
| REASONS FOR GRANTING THE WRIT | 8 |
| CONCLUSION | 17 |
| APPENDIX | 19 |


## TABLE OF AUTHORITIES

**Cases:**


| | Page |
|---|---|
| *United States v. Acosta-Cazares*, 878 F.2d 945 (6th Cir. 1989) | 11 |
| *United States v. Bronaugh*, 895 F.2d 247 (6th Cir. 1990) | 12-13 |
| United States v. Bruce, 939 F.2d 1053 (D.C. Cir. 1991) | 13 |
| *United States v. Duke*, 940 F.2d 1113 (8th Cir. 1991) | 10-11 |
| *United States v. Evans*, 888 F.2d 891 (D.C. 1989) | 9 |
| *United States v. Feliz-Cordero*, 850 F.2d 250 (2d Cir. 1988) | 10 |
| *United States v. Henry*, 878 F.2d 937 (6th Cir. 1989) | 11 |
| *United States v. Long*, 905 F.2d 1572 (D.C. Cir. 1990) | 10 |


**Constitutional Provisions:**


| | Page |
|---|---|
| Second Amendment, United States Constitution | 2, 16-17 |
| Fifth Amendment, United States Constitution | 2, 13-14 |


**Statutes:**


| | |
|---|---|
| *Felon Possessing Firearm In and Affecting Commerce* Title 18 U.S.C. § 922(g) | 5 |
| *Armed Career Criminal Act* Title 18 U.S.C. § 924(c)(1) | 3-18 |
| *Possession With the Intent to Distribute Schedule II Controlled Substance* Title 21 U.S.C. § 841(a)(1) | 2-3 |
| Title 28 U.S.C. § 1254(1) | 1 |


**Legislative History:**


| | |
|---|---|
| S. Rep. No. 225 9th Cong. 2d Sess. 1, 314 n.10 (1983), reprinted in U.S.C. Cong. and Admin. News 3182, 3492 n.10 | 15 |

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

---

JOHNNY LEE MUKES, Petitioner

v.

THE UNITED STATES OF AMERICA, Respondent

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

---

The petitioner, Johnny Lee Mukes respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circut, entered in the above-entitled procedings on January 10, 1992.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit has not been published and was not recommended for full-text publication. It is reprinted here in the Appendix hereto p. 19, infra.

The opinion of the United States District Court for the Western District of Tennessee, Western Division, has not been reported.

## JURISDICTION

The judgment of the Court below (Appendix, hereto, p. 19, infra) was entered on January 10, 1992. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Second Amendment, United States Constitution, which provides:

A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

2. The Fifth Amendment, United States Constitution, which provides:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put into jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation.

3. 21 U.S.C. § 841(a)(1), which provides:

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense or possess with intent to manufacture, distribute or dispense, a controlled



substance.

4. 18 U.S.C. § 924(c), which provides:

(1) Whoever, during, and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a machinegun, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or is equipped with a firearm silencer or firearm muffler, to imprisonment to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

(2) For purposes of this section, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(5) 18 U.S.C. § 922(g), which provides:

It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien, is illegally or unlawfully in



the United States;

(6) who has been discharged from the Armed Forces under dishonorable conditions; or

(7) who, having been a citizen of the United States, has renounced his citizenship;

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

## STATEMENT OF THE CASE

### A. Course of Proceedings in the Case now before this Court

A federal grand jury returned a three-count indictment against the petitioner. Count 1 charged him with violation of 21 U.S.C. § 841(a)(1), possession with intent to distribute a schedule II controlled substance. Count 2 charged the petitioner with violation of 18 U.S.C. § 924(c), using or carrying a firearm during, and in relation to, a drug trafficking crime. Count 3 charged the petitioner with violation of 18 U.S.C. § 922(g), possessing, as a convicted felon, any firearm in or affecting commerce.

The petitioner pleaded not guilty on March 8, 1990. The trial began on June 5, 1990. The jury deliberated the case the following day and found the petitioner guilty on all three charges.

On August 9, 1990, the court sentenced the petitioner to 240 months on Counts One, Two, and Three, and gave three years supervised release with a $150.00 special assignment. On September 27, 1990 an amendment was entered wherein the petitioner received 180 months for Count One, 60 months on Count Two to run consecutively with Count One, and 180 months on Count Three to run concurrently with Count One.

On October 9, 1990, the petitioner filed his notice of appeal. The central issue of the appeal turned on the application of 18 U.S.C. § 924(c)(1) which made it a separate felony to use or carry a firearm in relation to and during a drug trafficking crime. Petitioner pointed out that some circuits had construed the provision of using a firearm narrowly, holding that a defendant could not be convicted of 18 U.S.C. § 924(c)(1) unless there was evidence of an underlying relationship between the firearm in question and the drug trafficking or other crime that the statute demands before a defendant can be convicted under this statutory provision. In the petitioner's case there was no such evidence of any such underlying relationship except for the physical proximity of the firearms and the cocaine.

The Court of Appeals for the Sixth Circuit issued its decision in January 10, 1992. It stated that the precedent of



the Sixth Circuit supported the "drug fortress" theory, which holds that if it reasonable appears that the firearms in question are being used to protect the drugs or facilitate the drug transaction in question, then the firearms should be considered being used in relation to the crime of drug trafficking. The Court of Appeals, in adhering to this interpretation, relied more on precedent than on legislative history or the constitutional rights afforded to citizens in the protection of life and liberty. The Court of Appeals noted the conflict between its interpretation of 924(c)(1) and that of other circuits, but felt bound to follow its own precedent unless and until directed by the United States Supreme Court or Congress.

B. Relevant Facts Concerning the Underlying Conviction

On September 26, 1989, police obtained a search warrant for cocaine and entered a house in Memphis wherein the petitioner was found ironing trousers on the floor of a rear bedroom. The Memphis law-enforcement authorities escorted the petitioner out of the bedroom to the living room and proceeded to search the drawer of a bedside nightstand, whereupon they discovered baggies containing what was later confirmed to be cocaine. Police also discovered two firearms, a Derringer .38 pistol and a small .25 automatic, the second unloaded. Neither of the firearms had been registered and one was later found to be stolen. The petitioner was alone in the house when the police arrived but did not reside

at the house.

## REASONS FOR GRANTING THE WRIT

A defendant has been improperly convicted of using or carrying a firearm, during and in relation to a drug trafficking offense, under 18 U.S.C. § 924(c)(1) in a situation in which the defendant was convicted of a drug trafficking crime, two firearms was found in the same drawer as were the relevant narcotics at the house in which the defendant was found, because the use or carrying of the firearms in question for the purpose of drug trafficking has not been proven by the government.

The Sixth Circuit has invited direction as to the interpretation of 18 U.S.C. § 924(c)(1) (Supp. 1989). The statute, in relevant part, states, ...whoever, during, and in relation to any...drug trafficking crime...uses or carries a firearm, shall in addition to the punishment provided for such crime...be sentenced to imprisonment for five years. Hitherto, there has been no unanimity in the various Circuits' interpretation of the phrase, "uses or carries".



a. Various Interpretations of the phrase "uses or carries."

Then-Judge Clarence Thomas, in *U.S. v. Long*, 905 F.2d 1572 (D.C. Cir. 1990), summed up the position of the District of Columbia Circuit. In *Long*, the court considered the applicability of 18 U.S.C. § 924(c)(1) in a similar factual situation in which law-enforcement authorities, supported by a search warrant, discovered an unloaded handgun between sofa cushions and cocaine in various parts of the apartment, along with the defendant who was present, but who did not reside at the apartment. Then-Judge-Thomas, writing for the court, overturned the jury's conviction of the defendant on 18 U.S.C. § 924 (c)(1), stating that, in order to convict, evidence must be offered that the defendant actually or constructively possessed the firearm. *Id.* at 1578. The court in *Long* was particularly troubled that a conviction in this situation for "use" of the gun in question would be an indication that the word "use" had no clear boundaries. *Id.* at 1577.

*Long* is merely the last of a chain of cases which speak to the District of Columbia Circuit's relatively conservative interpretation of the phrase "uses or carries", for purposes of Title 18, U.S.C. § 924(c)(1). In *United States v. Evans*, 888 F.2d 891 (D.C. Cir. 1989), the court upheld the conviction based on the applicable statute but counseled that "the mere presence of a gun near the commission of the felony may not be sufficient to show that the gun was carried in relation to that felony"

The position of the Second Circuit Court of Appeals is consistent with the District of Columbia Circuit. In *United States v. Feliz-Cordero*, 859 F.2d 250 (2d Cir. 1988), the court reversed the conviction of the defendant for violation of 18 U.S.C. § 924(c)(1). Examining the legislative history of the statute, the court in *Feliz-Cordero* found that in order to fall under the provision of "uses" in 924(c)(1), the state had to demonstrate that the possessor intended to have the firearm located in a place that would allow for use during a transaction. *Id.* at 254. The court also held that mere possession of a gun by a drug trafficker to be insufficient for conviction, and that the state was required to demonstrate an association between the firearm and the primary crime. *Id.* The court found that a loaded firearm in a dresser drawer was insufficient grounds for conviction under 18 U.S.C. § 924(c)(1). *Id.* The court emphasized that the defendant could not be convicted of carrying a firearm, also prohibited under the statute, because there was no proof that the firearm was within reach of the defendant during the commission. *Id.* at 253-54.

The Eighth Circuit Court of Appeals, in *United States v. Duke*, 940 F.2d 1113 (8th Cir. 1991) adopted an approach that, like the interpretations of the District of Columbia and Second Circuits, significantly limited a jury's discretion in finding a defendant guilty of 924(c)(1). The court stated that, in order to prove guilt, the relevant firearm must be an integral part of the defendant's undertaking and must, by its availability,



increase the success of the criminal undertaking. *Id.* at 1118. The court in *Duke* acknowledged that, because firearms are there for the objective of terror and intimidation, guns that are found at drug houses which resemble armed fortresses could satisfy the standard set out by the court. *Id.* at 1119. In *Duke*, the court did find that the defendant's house resembled such a fortress because of a chain-link fence, surveillance cameras, scanners, an electronically-controlled gate, guard dogs, and periods in which large amounts of narcotics and cash were kept in the house. *Id.* In the instant case, there is no evidence whatsoever that the house that the petitioner was visiting at represented such a fortress.

The position of the Sixth Circuit Court of Appeals markedly contrasts with the positions of the District of Columbia, Second, and Eighth Circuits. The Sixth Circuit Court of Appeals in *United States v. Acosta-Cazares*, 878 F.2d 945 (6th Cir. 1989) determined that 18 § U.S.C. 924(c)(1) should be broadly construed. It is not necessary, according to the court, that ownership or actual possession be proven. *Id.* at 952. In *United States v. Henry*, 878 F.2d 937, 944 (6th Cir. 1989), the court held that , if it "reasonably appears" that the weapons found on the premises are controlled by the defendant and are meant to be used to protect or deal in controlled substances, then the defendant is guilty under 18 U.S.C. § 924(c)(1). Actual possession is not required, mere constructive possession is sufficient.

In the United States v. Bronough, 895 F.2d 247 (6th Cir. 1990), the defendant was charged with using a firearm in connection with an extensive cocaine-related operation. The gun in question was not even found and the defendant was not charged with any drug offenses. But the court held that the defendant, by pleading guilty to a single charge of obtaining a firearm by making a false statement, had admitted that the gun existed. *Id.* at 251. Moreover, there was sufficient evidence, according to the Court of Appeals, that the defendant took the gun into the relevant crack house. *Id.* at 250. With this evidence, and with very little else, the court upheld the defendant's conviction, although it admitted that some might consider it "anomalous that a defendant can receive a five-fold increase in his sentence because a preponderance of the evidence indicates he is guilty of an uncharged crime." *Id.* at 251.

In Bronaugh, however, Circuit Judge Wellford dissented, wisely counseling that the (uncharged) drug accusations were not demonstrated, even by a preponderance of the evidence, to be related to the single weapon specified in the indictment. *Id.* at 253-54 (Wellford, J., dissenting). Judge Wellford opined that unless the two activities were clearly related, the defendant should not be convicted of using or carrying a firearm in relation to a drug-trafficking offense. *Id.* at 254 (Wellford, J., dissenting). Judge Wellford's dissenting opinion is consistent with the holdings of the District of Columbia Circuit, the Second Circuit, and the Eighth Circuit, and should be binding



precedent in all federal courts.

b. The Fifth Amendment and Interpretation of 18 U.S.C. § 924(c)(1).

The conservative application of the District of Columbia, Second, and Eighth Circuits is more consistent with the intent of the Fifth Amendment. To hold a defendant guilty of carrying or using a firearm that may not even be his, in an house or apartment that he may not even reside in, because of an element as routine as the reasonable appearance of constructive possession, is to fall far short of the usual standard of proof in criminal cases, of proof beyond a reasonable doubt. Indeed, the standard adopted in the fortress analogy theory even falls short of the "clear and convincing evidence" standard. The low burden that the Sixth Circuit requires of the State greatly increases the possibility that a defendant will serve imprisonment for five additional years for a crime that he/she did not commit.

The Court of Appeals for the District of Columbia, in United States v. Bruce, 939 F.2d 1053 (D.C. Cir. 1991) cited by the Sixth Circuit Court of Appeals in the present case, pointed out that possession of a drug with intent to distribute it, is, in some ways, a passive crime. The court in the present case,

although agreeing with this statement, states that it is, nonetheless, analytically possible to use a gun in relation to this passive crime before the distribution is achieved. As an example, the court mentions that a defendant who possesses a controlled substance and fires at an individual attempting to deprive the defendant of narcotics possession, has violated 18 U.S.C. § 924 (c)(1). But this example is highly distinguishable from the situation at hand; indeed, the distinction emphasizes why the Sixth Circuit's approach is inconsistent with the Fifth Amendment. Shooting at someone is an active crime, even if the underlying crime (possession of a controlled substance with intent to distribute) is not. In the situation at hand, both the underlying crime (possession with intent to distribute) and the instant accusation (using a firearm by having it in the house) are passive acts. These two charges are, therefore, dangerously easy to convict without establishing sufficient evidence. This is why it is necessary to prove the nexus between § 841(a)(1) and § 924(c)(1) beyond a reasonable doubt, before conviction. The drug-fortress analogy clearly violates the guarantee of affective safeguards to buttress the citizen's right to liberty.

c. The legislative history of 18 U.S.C. § 924(c)(1).

The legislative history of the present 18 U.S.C. 924(c)(1) further clarifies the fact that the approach of the District of



Columbia Court of Appeals, the Eighth Circuit Court of Appeals and the Second Circuit Court of Appeals is the better approach which should be followed by the Sixth Circuit. The United States Congress, in fact, revised 18 U.S.C. § 924(c)(1) to demonstrate that conviction required more than simple possession of a firearm. Conviction could only be justified if it could be found that the defendant had intent to use the firearm if a contingency arose or to make an escape. (S. Rep. No. 225, 98th Cong. & Admin. News 3182, 3492 n.10).

Certainly, the drug fortress analogy falls far short of this explicit goal of 941(c)(1).

The obvious purpose for the statute is to prevent the violence that frequently accompanies drug transactions. But the overly-broad interpretation that the Sixth Circuit has given to the legislative intent actually gives the law the opposite effect. To the degree a dealer of controlled substances is aware of the statute (if he/she is not aware of the statute, it will achieve no purpose whatsoever), he/she will reason that, the presence of a roommate's firearm, or that of a social host (in whose house a guest is residing, either temporarily or permanently), will make him/her guilty under 924(c)(1). He/she will conclude, therefore, that there is no additional risk in deliberately using a gun to achieve an illegal transaction.

d. Policy consideration in interpretation of Title 18 U.S.C.

§ 924(c)(1).

There are other reasons for rejecting the Sixth Circuit's approach, reasons oriented to policy considerations. Prison overcrowding may very likely be the single greatest obstacle to the effective rehabilitation and/or successful deterrence of obvious criminals. To put a defendant in prison for five additional years because a gun was found on premises that he may not even have occupied would fill the already too-full prisons with possible violators while necessarily freeing inmates who are definitely guilty of active and serious offenses--therefore increasing, rather than decreasing both the danger and the cost to the law-abiding taxpaying community.

e. The Second Amendment and Title 18 U.S.C. § 924 (c)(1).

There is one more compelling justification to adopt the reasoning of the Second, Eighth, and District of Columbia Circuits' interpretation of §24(c)(1). There is vigorous and animated debate about the meaning of the Second Amendment -- the amendment guaranteeing the right to "keep and bear arms." All parties to the discussion agree, however, that the Second Amendment guarantees the right to possess firearms in furtherance of militia purposes. The broad interpretation of 18 U.S.C. § 924 (c)(1) given by the Sixth Circuit would act as a deterrence to



those families, a member of which serves in the National Guard. How many guardsmen will feel rewarded by such service if a serviceman's or guardsman's relative/guest/roommate was sentenced to an additional half a decade because the serviceman's firearm was found on the premises of the home along with the defendant's controlled substance? The fortress analogy, however, lends itself to such abuse because of its breadth.

## CONCLUSION

For these reasons, the petition for certiorari should be granted. The position taken by the Sixth Circuit on the interpretation of Title 18, U.S.C. § 924 (c)(1) is overly broad and allows for imprisonment of a defendant on an unsubstantiated charge. As such it violates the Fifth Amendment of the United States Constitution which guarantees a person's liberty unless revoked with sufficient due process. Moreover, it impedes the effectiveness of the Second Amendment by discouraging individuals from carrying firearms, even for legitimate purposes such as service in a militia. Additionally, it encourages an unwise policy which will further promote the already serious problem of prison overcrowding. Finally, the Sixth Circuit Court of Appeals' interpretation of the legislation contradicts the legislative history and the purpose of Title 18, U.S.C. §

924(c)(1).

Respectfully submitted,

Charles E. Waldman

CHARLES E. WALDMAN
147 Jefferson, Suite 1102
Memphis, Tennessee 38103
(901) 521-9956



FILED
JAN 10 1992
LEONARD GREEN, Clerk

NO. 90-6300

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHNNY LEE MUKES,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.

Decided and Filed

BEFORE: **NELSON** and **SUHRHEINRICH**, Circuit Judges, and **ENGEL**, Senior Circuit Judge.

**PER CURIAM.** The main issue in this appeal turns on the district court's application of 18 U.S.C. § 924(c)(1). That statute provides as follows:

> "Whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years . . . ."

The defendant was convicted of, among other things, possessing cocaine with intent to distribute it. "During and in relation to" this drug trafficking crime, the jury found, the defendant "use[d] or carrie[d] a firearm;" on the strength of this finding, which was based on the presence of two handguns in a drawer where the defendant kept his supply of cocaine, the district court imposed an additional five year prison sentence pursuant to the provision quoted above.

Inviting us to reject the "broad" interpretation we have placed on § 924(c) in cases such as *United States v. Henry*, 878 F.2d 937 (6th Cir. 1989), *United States v. Acosta-Cazares*, 878 F.2d 945 (6th Cir.), *cert. denied*, 493 U.S. 899 (1989), and *United States v. Bronaugh*, 895 F.2d 247 (6th Cir. 1990), the defendant urges us to hold as a matter of law that the evidence in the instant case was not sufficient to establish a

"nexus" between the firearms and the drug activity. Although the defendant's argument has some support in case law from other circuits, we do not find it persuasive; we shall affirm the district court's judgment in all respects.

I

Pursuant to a warrant, officers from the organized crime unit of the local police department searched a house occupied by the defendant in Memphis, Tennessee. They found the defendant on the floor of a rear bedroom, where he appeared to have been doing some ironing. A search of the closed top drawer of a nightstand in the bedroom disclosed two plastic bags containing what proved to be 32.9 grams of cocaine. The officers asked the defendant where the cocaine came from, and he said that it had been brought to him the night before.

In the same drawer where the defendant had stashed the cocaine the officers found a loaded .38 caliber derringer and an unloaded .25 caliber automatic pistol. Neither of the firearms had been registered, it developed, and one of them turned out to have been stolen.

A federal grand jury returned a three count indictment against the defendant. Count 1 charged him with possession of the 32.9 grams of cocaine with intent to distribute it, a violation of 21 U.S.C. § 841(a)(1). Count 2 charged that during and relation to the foregoing offense, the defendant carried and used the .38 caliber derringer and the .25 caliber pistol in violation of 18 U.S.C. § 924(c). Count 3 charged the defendant with having been convicted of a series of felonies and with possessing the firearms in violation of 18 U.S.C. § 922(g), a statute that makes it unlawful for a convicted felon to possess any firearm "in or affecting commerce . . . ."

A jury found the defendant guilty on all three counts. The trial court sentenced him to imprisonment for concurrent terms of 180 months on Counts 1 and 3. As to





Count 2, the court imposed a consecutive sentence of 60 months. The defendant perfected a timely appeal.

II

> "In cases involving firearms found on premises under the control of a drug offense offender, the courts have developed a 'fortress analogy' theory, which holds that if it reasonably appears that the firearms found on the premises controlled or owned by a defendant and in his actual or constructive possession are to be used to protect the drugs or otherwise facilitate a drug transaction, then such firearms are used 'during and in relation to' a drug trafficking crime." *United States v. Henry*, 878 F.2d 937, 944 (6th Cir. 1989), citing *United States v. Matra*, 841 F.2d 837, 843 (8th Cir. 1988), and *United States v. LaGuardia*, 774 F.2d 317, 321 (8th Cir. 1985). Accord *United States v. Head*, 927 F.2d 1361, 1366 (6th Cir.), *cert. denied*, 112 S. Ct. 144 (1991).

Under *Henry* and the Sixth Circuit cases that have followed it, it seems to us that a rational jury could have concluded that the defendant's drugs and the guns were being kept in the same place to facilitate the protection of the former by the latter.

It is true, as the Court of Appeals for the District of Columbia Circuit pointed out in *United States v. Bruce*, 939 F.2d 1053, 1055 (D.C. Cir. 1991), that possession of a drug with intent to distribute it in the future "is in a sense a passive crime . . . ." Surely however, it is not analytically impossible for someone to use a gun in relation to the passive possession of drugs before the drugs are distributed. If a person who is in possession of drugs uses a gun to shoot someone who attempts to deprive him of possession, for example, such a use unquestionably comes within 18 U.S.C. § 924(c)(1). It is well established, moreover, that one can use a gun without displaying it; a drug dealer who keeps a loaded weapon with his drugs for the purpose of protecting his inventory is "using" the gun in relation to his drug crime regardless of whether he has occasion to brandish the weapon or fire it. See *Matra*, 841 F.2d at 842-43, and the cases there cited. As we said in *Head*, 927 F.2d at 1366, quoting *Acosta-Cazares*, 878 F.2d at 952, "[t]he terms 'uses' and 'carries,' in Section 924(c)(1), 'should be construed broadly

to cover the gamut of situations where drug traffickers have ready access to weapons with which they secure or enforce their transactions.'"

The Court of Appeals for the Second Circuit pointed out in *United States v. Feliz-Cordero*, 859 F.2d 250, 254 (2d Cir. 1988), that "section 924(c) requires more than mere possession of a firearm. Rather, there must be some relation or connection between the firearm and the underlying crime." But notwithstanding the "frequent connection between firearms and narcotics trafficking," *id.*, the *Feliz-Cordero* court held that the necessary connection could not be inferred from the presence of a loaded .38 caliber Smith and Wesson revolver in the drawer of a dresser located in an apartment that also contained cocaine, drug records, $11,000 in cash, a beeper, and extra rounds of ammunition. We have noted elsewhere that this holding is difficult to reconcile with our circuit precedent. *United States v. Jackson*, No. 90-1609, 1991 U.S. App LEXIS 1757, at *17 (6th Cir. Feb. 1, 1991). Insofar as there is a conflict, of course, and unless the Supreme Court or Congress should instruct us otherwise, we must follow our own precedents.

III

At the time when it was discovered in the nightstand drawer, the loaded .38 caliber derringer had its barrel secured in place by a bolt with a nut on the end. (The bolt served as a substitute for a latch mechanism that had been removed.) The gun was capable of being fired, and there was testimony that an officer had test fired it with the bolt in place.

At the time when it was introduced in evidence at the trial, the derringer no longer had the bolt and nut in place. The defendant argues that without the bolt and nut, the derringer was not a "firearm" because it might have misfired or exploded if someone had tried to shoot it in this condition. The defendant also argues that without





the bolt and nut, the derringer would have been "less accessible to a person intending to use it."

These arguments border on the frivolous. The bolt and nut were unquestionably in place when the weapon was found, and the weapon was unquestionably loaded and capable of being fired at that time. The fact that removal of the bolt might have made it more dangerous for someone to fire the weapon hardly means that what the officers found in the nightstand of the defendant's bedroom was not a firearm. The derringer was obviously a firearm, and we do not believe that it was unduly prejudicial for the jury to be allowed to see the gun without the bolt; the testimony made it very clear that the bolt was merely a safety device.

Although the defendant was the only person found in the house, he argues that there was no proof that he was in actual or constructive possession of the room in which he was found or of the weapons in the nightstand drawer. We reject these arguments as well; the evidence must be viewed in the light most favorable to the government, and the government is entitled to the benefit of all favorable inferences that may reasonably be drawn from the evidence. *United States v. Tilton*, 714 F.2d 642, 645 (6th Cir. 1983). Under these principles, the jury was entitled to find that the defendant was in control of the room and its contents, just as it was entitled to find that the weapons were being kept in the nightstand drawer to help protect the drugs that had been delivered to the defendant the night before.

On the basis of what has already been said, finally, the conviction under 18 U.S.C. § 922(g) must be upheld; it is undisputed that the defendant had previously been convicted of a series of felonies, and if he "used" a firearm under § 924(c), he "possessed" the firearm under § 922(g).

**AFFIRMED.**

**ISSUED AS MANDATE:** 2/3/92
COSTS: No Costs
FILING FEE . . . . . $
PRINTING . . . . . $
TOTAL . . . . . $

A TRUE COPY
Attest:
LEONARD GREEN, Clerk
By Diane Schaub
Deputy Clerk

## CERTIFICATE OF SERVICE

I, Charles E. Waldman, a member of the Sixth Circuit, appointed to represent the petitioner pursuant to the Criminal Justice Act, hereby certify that on this 7th day of March, 1992, three copies of the petition of the writ of Certiorari in the above-entitled case were mailed, first class postage, prepaid to Stuart J. Canale, Assistant United States Attorney, Western District of Tennessee, Western Division, 1026 Federal Office Building, Memphis, Tennessee 38103, Counsel for the Respondent. I further certify that all parties required to be served have been served.

Charles E. Waldman

Charles E. Waldman
147 Jefferson, Suite 1102
Memphis, Tennessee 38103